IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7985 OF 2005.

Shri Radhakrishna Mani Tripathi,
Room No.299, 4/4, Maya Chawl,
Subhash Nagar, Village Road,
Near CEAT Tyres, Bhandup,
Mumbai. ... PETITIONER

-VERSUS-

1. Mr. L. H. Patel,
Room No.6, 1st floor,
Krishna Nivas,
Hemkulani Cross Road No.1,
Kandivali (W), Mumbai 400 06.

2. K. S. Hore,
Presiding Officer
1st Labour Court Thane,
having his office at
3rd floor MIDC Office Complex
Mulund Check-Naka, Thane-6.

Yogendra M. Pendse for the petitioner.

S.C.Naidu with C.R.Naidu for respondent No.1.

CORAM : V.C. DAGA, J.

RESERVED ON : 20th December 2005.

PRONOUNCED ON : 25th January 2006.

JUDGMENT :

. Rule, returnable forthwith.

. Heard finally by consent of the parties.

. Perused petition and annexures annexed thereto.

2. The substantial issue raised is: whether the Labour Court constituted under the provisions of the Industrial Disputes Act, 1947 ("Act" for short) can restore or recall the award passed by it after expiry of 30 days from its publication i.e. after it becomes enforceable.

3. The parties were directed to submit their written submissions to supplement their oral submissions. Accordingly, both of them have filed their written submissions. The same are taken on record.

FACTS :

. The facts in nutshell are as under:

4. The Deputy Commissioner of Labour, Thane in exercise of powers conferred under section 10(1) read with section 12(5) of the Act referred industrial dispute raised by the Petitioner for adjudication to the Second Labour Court, Thane which came to be registered as Reference (IDA) No.224 of 1996. The Second Labour Court, Thane caused to issue notices dated 1st October, 1996 to both parties calling upon them to appear before it.

5. The notice to the respondent No.1 herein was addressed to M/s.Gayatri Enterprises, Vasai, 17-32 Gayatri Industrial Estate, Navaghar, Vasai Road (East), Vasai- 401 202, the address described in the Order of Reference. Notice was returned unserved as the said premises was closed. There was nobody to receive notice. According to the respondent, partnership has been dissolved. Consequent upon dissolution; the business was permanently and irrevocably stopped.

6. The petitioner-workman herein, pursuant to the Notice, filed a statement of claim asserting that he was entitled to reinstatement with full back-wages and continuity of service on and with effect from 1st March 1995.

7. The Labour Court was pleased to direct substituted service. The notice was served by pasting it on the outer door of the business premises described in the address given which was closed.

8. Based on the above service, the Learned Labour Court was pleased to proceed *ex parte* against respondent No.1 and passed an award on

12th June, 1998 in favour of the petitioner. The Award was remitted by the Labour Court to the Deputy Commissioner of Labour, Thane for publication. The Deputy Commissioner of Labour, Thane approved publication by display on the Notice Board of the Labour Court.

9. The Office of the Labour Court by letter dated 7th August, 1998 informed the parties that the Award was published on the Notice Board on 5th August, 1998.

10. The petitioner sought execution of this *ex parte* Award. The Office of the Tahsildar, Vasai, in execution, issued Demand Notice dated 8th January, 1999 and served the same on one of the partners of respondent No.1. The partner of respondent No.1 made enquiries as to the circumstances in which the said demand was raised against him. As a result of this enquiry, he learnt that the recovery was pursuant to a certificate issued by the Office of the Commissioner of Labour, Thane.

11. The partner of respondent No.1 visited the Office of the Deputy Commissioner of Labour, Thane

who handed over a copy of the award to respondent No.1 on 27th January, 1999.

12. The respondent No.1 states that it was on that day for the first time he received the copy of the Award. That is how he claims to have come to know of the said Reference and consequent adverse award for the first time on 27th January, 1999.

13. The respondent No.1, thereafter, preferred an application under Rule 26(2) of the Industrial Disputes (Bombay) Rules, 1957 ("Bombay Rules" for short) on 29th January 1999 for setting aside the *ex parte* Award and prayed for restoration of the original Reference to file, which after hearing the parties came to be allowed vide order dated 12th July, 2005 passed by the Second Labour Court, Thane.

14. Being aggrieved by the above order dated 12th July, 2005, the petitioner has invoked writ jurisdiction of this Court under Article 226 and 227 of the Constitution of India raising an issue as to the power and authority of the Labour Court to pass the impugned order.

SUBMISSIONS :
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15. Mr.Pendse, learned Counsel for the Petitioner contends that the provisions of the Act do not permit any party to prefer an application for restoration of a reference after expiry of the period of 30 days from the date of publication of the Award.

16. Mr.Pendse contends that the industrial adjudication is governed by the provisions of the Act and Rules framed thereunder. That the rules framed under the Act provide for applicability of the provisions of Code of Civil Procedure, 1908 ("C.P.C." for short). Once the provisions of the C.P.C. are made applicable to the industrial adjudication, admittedly, the provisions of Order 9 Rule 13 thereof would be attracted. But, unlike ordinary Civil Code, Industrial Tribunal and the Labour Courts have limited jurisdiction in that behalf. While Industrial Court will have jurisdiction to set aside the *ex parte* award, but having regard to the provisions under Section 17-A of the Act, the application thereof must be filed before expiry of 30 days from the publication thereof and not thereafter. In his submission, the Tribunal after expiry of 30 days from the date

of publication of the award does not retain jurisdiction over the dispute referred to it for adjudication. It is, thus, submitted that the Tribunal has no power to entertain any such application in connection with such dispute because the award made by the Industrial Court becomes enforceable under Section 17-A of the Act on the expiry of 30 days from the date of its publication. That once the Award becomes enforceable, Industrial Tribunal and/or Labour Court becomes *functus officio*. In support of this submission, he relied upon the judgment in the case of **Sangham Tape Co. Vs. Hans Raj**, 2005 SCC (L&S) 65, in which, according to him, the Apex Court has, in categorical terms, held that the Court under the Act becomes functus officio and, thereafter, application for recalling of any award cannot be entertained by the Labour Court or Tribunal.

17. Mr.Pendse, learned counsel for the petitioner, while applying the ratio of the above case to the facts of the present case, submits that in view of the fact that the award was passed on 12th June, 1998 and having published it on 5th August, 1998, the award became enforceable on 5th

September, 1998, as such Labour Court was *functus officio* with effect from 6th September, 1998. In this view of the matter application dated 29th January, 1998 made for setting aside the award was not at all tenable in the eyes of law. That the Labour Court by that time had lost its jurisdiction. He also placed reliance on the judgment of the learned single Judge of this Court in the case of **Vasant Govind Shirsekar V. Mhatre Pen and Plastics Pvt. Ltd. & Ors.**, 2005 II CLR 969 which is based on the Apex Court judgment in the case of **Sangam Tape Co.** (cited supra) to buttress his submission.

18. Per contra, learned Counsel appearing for respondent No.1 placing reliance on Rule 26(2) of the Bombay Rules, contends that the respondent was entitled to file application for setting aside *ex parte* award within a period of 30 days from the date of receipt of copy of the award. It is the case of the respondent No.1 that he received copy of the award only on 27th January, 1999 for the first time and the application was filed by him on 29th January, 1999. Hence, his application was well within the time prescribed under Rule 26(2) of the Bombay Rules. He tried to distinguish the

judgment of the Apex Court delivered in the case of **Sangham Tape Co.** (supra) on the basis of statutory provisions and that of the learned single Judge of this Court in the case of **M/s.Mhatre Pen & Plastics Pvt.Ltd.** (supra) on facts. According to him, Rules 26(2) and 31(A) which exist in the Bombay Rules do not find place in the Rules framed by the Central Government under the Industrial Disputes Act. That there is no specific rule in the Central Rules unlike Bombay Rules which provides for the period during which application can be made. According to him, this distinguishing feature is lost sight of by the learned counsel for the petitioner while placing reliance on the Apex Court judgment in the case of Sangham Tape Co. (supra).

19. Learned counsel for respondent No.1 placed reliance on another Judgment of the Learned Single Judge of this Court in the case of **M/s South Seas Distilleries and Breweries Pvt. Ltd., Thane V. Deepak R. Patne and another**, 2003 LAB.I.C. 262 in support of his submissions, which takes into account the distinguishing feature based on statutory provisions pointed out by the learned counsel for respondent No.1. The facts of this

case reveal that the *ex parte* Award was made on 3rd May, 1999. A copy of the intimation of publication of award was received on 10th June, 1999, the petitioner in that case averred that he came to know of the Award on 31st August, 1999; The application for certified copy of the Award was made on 5th October, 1999 (35th day after knowledge of the Award, as stated by the petitioner). The certified copy was received on 8th October, 1999. The application for restoration was filed on 20th November, 1999. On these facts, it was held that the petitioner having moved the application under Rule 26 beyond period of 30 days from the date of receipt of the Award, the Labour Court had no jurisdiction to entertain application for setting aside *ex parte* Award.

20. Learned Counsel for respondent No.1, turning to the facts of the case in hand, submits that on merits the Labour Court has come to the conclusion that the notice and process of the Reference proceedings were never served upon the said respondent. That the Labour Court held that the petitioner was aware of the fact that the establishment of respondent No.1, the address of

which was given in the Reference, was closed; and no one was available on the given address to accept the service. That the Labour Court also noticed that, in another application filed the petitioner before the Fourth Labour Court, Thane, being Application (IDA) No.69/1995, the residential address of the partner/ respondent No.1 was given and not the factory address. The Labour Court, thus, concluded that the petitioner-workman was very much aware of the address of respondent No.1 where service could have been effected. However, he got the notice of the Reference proceedings issued on the factory address and sought to effect service by pasting it on the premises which ceased to be the business premises of respondent No.1 and where no one was available to accept service of notice.

21. The learned counsel for respondent No.1 tried to distinguish the judgment of the learned single Judge in the case of **M/s.Mhatre Pen & Plastics Pvt.Ltd.** (supra) contending that in that case the award was passed on 13th January, 1997. It was published on 6th March, 1997. The employer had received copy of the Award sent by the workman on 7th March, 1997. The employer was, thus, in

receipt of a copy of the Award forwarded by the workman on 7th March, 1997. Period of 30 days from the date of receipt of the Award had, thus, started running from 8th March, 1997 and expired on 7th April, 1997. Application for restoration for setting aside the *ex parte* Award and restoration of Reference was filed on 17th April, 1998; much after expiry of 30 days from the date of service of the award. From the facts of the said case it is, thus, clear that the employer had filed an application after more than one year in spite of having the knowledge of the *ex parte* Award and also from the date of publication of the Award on 7th March, 1997. More than 30 days had elapsed after receipt of copy of the Award. By the time application was made, the Award had became enforceable under Section 17A of the Act.

22. The learned Counsel for the petitioner reiterating the reliance placed on the another judgment of the learned Single Judge in the case of **M/s South Seas Distilleries and Breweries Pvt. Ltd.** (supra) contends that the learned Single Judge in para-8 considered the impact of Rules 26 and 31 (A) of the Bombay Rules in its right perspective.

23. The learned counsel for respondent No.1 further submits that there is no apparent conflict of law between two judgments of this Court, one in the case of **M/s.Mhatre Pen & Plastics Pvt.Ltd.** (supra) and, another **M/s South Seas Distilleries and Breweries Pvt. Ltd.** (supra). The decisions have been rendered on the facts obtainable in the respective cases.

24. The learned Counsel for respondent No.1 also referred two other judgments of the Apex Court; which were referred to in the case of **M/s South Seas Distilleries and Breweries Pvt. Ltd.** (supra); one delivered in the case of **Anil Sood Vs. Presiding Officer, Labour Court**, 2001 II CLR 18 and another delivered in the case of **Grindlays Bank Ltd., V/s Central Government Industrial Tribunal and others**, 1980 Supp SCC 420: 1981 SCC (L&S) 309.

25. In re-joinder, learned Counsel for the petitioner contends that as per Rule 31-A, a duty is caste upon the Board; Court or the Tribunal as the case may be to inform the respective parties to the dispute, the publication of the report or award as the case may be. In this context, he

submits that the Second Labour Court had already informed both the parties vide its letter dated 7th August, 1998 (Exh.'B') and that it is not the case of respondent No.1 that the address of M/s.Gayatri Enterprises was wrong address; therefore, it has to be presumed that M/s.Gayatri Enterprises, the respondent No.1 was already in receipt of the award. Even it was not the case of respondent No.1 that he was not at all served with the proceedings of the reference. On the contrary, the Labour Court in its award (Exh.'A') has taken a note that the first party- employer (respondent No.1 herein) was duly served with the notice and, therefore, the plea of respondent No.1 is not to be relied upon.

26. In the above context, learned counsel for the petitioner further submits that respondent No.1 had given his address that of Mumbai and there was a publication made by the petitioner about the award in the local daily news paper by name 'Asian Age' dated 9th October, 1998, as such it has to be presumed that at least by 9th October, 1998 the respondent No.1 was made aware about the publication of the award. The learned counsel for the petitioner, therefore, submits

that at least the period of knowledge about the passing of the award had on and from 9th October, 1998 in terms of Rule 31A of the Bombay Rules; and, thus, the limitation of 30 days had started running from the date of knowledge as contemplated under Rule 26(2). Learned counsel for the petitioner, thus, submits that the respondent No.1 should have been diligent enough to apply for setting aside *ex parte* award within 30 days at least from the date of knowledge through the news paper publication.

27. Before considering the rival contentions raised by the rival parties, it is necessary to notice certain statutory relevant provisions and the law holding the field.

Statutory Provisions :
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28. The Power and jurisdiction of Labour Court under the Act is briefly set out below :

> "**11. Procedures and powers of Conciliation Officers, Boards, Courts and Tribunal.**- (1) Subject to any Rules that may be made in this behalf, an Arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as Arbitrator or other authority concerned may think fit.
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> ....

29. Section 11 (3) empowers the authorities with the same powers as vested in a Civil Court under C.P.C. (5 of 1908), when trying a suit, in respect of the following matters, namely:

(a) Enforcing the attendance of any person and examining him on oath.

(b) Compelling the production of document and material objects;

(c) Issuing commissions for the examination of witnesses;

(d) In respect of such other matters as may be prescribed.

30. Section 17-A, which is relevant for a decision in this petition, is extracted below :

"**17A. Commencement of the award.-** (1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under Section 17;

Provided that-

(a) if the appropriate Government is of opinion, in any case where the award has been given by a Labour Court or Tribunal in relation to an industrial dispute to which it is a party; or

(b) if the Central Government is of opinion, in any case where the award has been given by a National Tribunal,

that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the

award shall not become enforceable on the expiry of the said period of thirty days;

(2) Where any declaration has been made in relation to an award under the proviso to sub-section (1), the appropriate Government or the Central Government may within ninety days from the date of publication of the award under Section 17, make an order rejecting or modifying the award, and shall, on the first available opportunity, lay the award together with a copy of the order before the legislature of the State, if the order has been made by a State Government, or before Parliament, if the order has been made by the Central Government;

(3) Where any award as rejected or modified by an order made under sub-section (2) is laid before the legislature of a State or before Parliament, such award shall become enforceable on the expiry of fifteen days from the date on which it is so laid; and where no order under sub-section (2) is made in pursuance of a declaration under the proviso to sub-section (1) the award shall become enforceable on the expiry of the period of ninety days referred to in sub-section (2).

(4) Subject to the provisions of sub-section (1) and sub-section (3) regarding the enforcibility of an award, the award shall come into operation with effect from such date as may be specified therein, but where no date is so specified, it shall come into operation on the date when the award becomes enforceable under sub-section (1) or sub-section (3), as the case may be.

31. Section 38 of the Act empowers the appropriate Government to make Rules for the purpose of giving effect to the provisions of this Act. The then State Government of Bombay in exercise of powers conferred on it under section 38 of the Act has framed the Rules known as the

Industrial Disputes (Bombay) Rules, 1957 (the Bombay Rules)

32. Rules 26 and 31A of the Bombay Rules are relevant for the purpose of this Petition. The same are reproduced herein below :

> "**26. Board, Court, Labour Court, Tribunal, Tribunal or Arbitrator may proceed exparte.-** (1) If without sufficient cause being shown, any party to a proceeding before a Board, Court, Labour Court, Tribunal or an Arbitrator fails to attend or be represented, the Board, Court, Labour Court, Tribunal or Arbitrator may proceed exparte.
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> (2) Where any award, order or decision is made exparte under subrule (1), the aggrieved party, may within thirty days of the receipt of a copy thereof, make an application to the; Board, Court, Labour Court, Tribunal or an Arbitrator, as the case may be, to set aside such award, order or decision. If the Board, Labour Court, Tribunal or Arbitrator is, satisfied that there was sufficient cause for non-appearnace of the aggrieved party, it or he may set aside the award, order or decision so made and shall appoint a date for proceeding with the matter:
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> Provided that, no award, order or decision shall be set aside on any application as aforesaid unless notice thereof has been served on the opposite party.
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> "**31A. Publication of report or award, etc.-** (1) Within thirty days of the date of receipt of the report of a Board or award of a Labour Court or Tribunal by it the State Government,-
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> (a) shall, if it considers that having regard to the importance of such report or award its publication in the Official Gazette is necessary cause it to be published in the Official Gazette;

(b) if it considers that the report or award is not sufficiently important it may cause a copy thereof together with a notification under section 17 to be forwarded to the Board or a Court or Tribunal, as the case may be, for publication on the Notice Board at its Office.

(2) Where the report or award is published in the Official Gazette or on notice board of the Board, Court or Tribunal, the State Government shall at the time of such publication forward a copy thereof to the parties to the dispute, and where the report or award is published on notice board of the Board, Court or Tribunal, such Board, Court or Tribunal, shall inform the State Government and the parties concerned of the date of such publication on the notice board.

(Emphasis supplied)

Dissection :

33. The dissection of the above relevant statutory provisions makes it clear that the Legislature in its wisdom has given complete freedom to the authorities under the Act to devise its own procedures for adjudication of a dispute referred to it. The Tribunal, therefore, can devise its own procedure to decide a Reference. However, if any Rules are made in that behalf, then the Tribunal has to observe the said Rules. The adjudicating authority is required to enquire into the dispute referred to it and upon completion of the enquiry it has to make an Award. Section 16(2) lays down the manner in which the Award is required to be made. Section 17 mandates

that every Award should be published within a period of 30 days from the date of its receipt by the appropriate Government in the manner it deems fit. Section 17(2) provides that an Award published under sub-section (1) of section 17 shall be final and shall not be called in question in any Court in any manner whatsoever. Rule 31A of the Bombay Rules provides for publication of report or award. Sub-rule (2) thereof provides that the State Government shall at the time of publication forward a copy thereof to the parties to the dispute. Rule 26(2) permits the aggrieved party to make an application to the Labour Court or Tribunal to set aside *ex parte* award within thirty days from the receipt of the copy thereof.

Consideration of Case Laws :
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34. Having examined the statutory provisions and sweep thereof, let me turn to the precedents holding the field.

35. In case of **Sangam Tape Company** (cited supra), the Supreme Court was concerned with the case decided by the Labour Court, Punjab. The Punjab Rules are identical with that of the Central Rules. The copy of relevant provisions of the Punjab Rules is also placed on record. Rules

22 and 24 of the Punjab Rules are identical with that of Rules 22 & 24 of the Central Rules. As against this, Rule 26(2) and 31A(2) of the Bombay Rules are different and distinct unlike Central Rules.

36. In the case of **Grindlays Bank Ltd.** (cited supra) the Supreme Court was concerned with Rule 22 and 24 of the Industrial Disputes (Central) Rules, 1957. Rule 22 empowers the Labour Court etc. to proceed *ex-parte*, however, there is no power for entertaining an application to set aside *ex parte* Award, unlike Rule 26(2) of the Bombay Rules. The Supreme Court, in these peculiar circumstances, was required to consider an application for setting aside the ex-parte award. The Supreme Court in para-4 of the Judgment has taken note of the contention that neither the Act nor the Rules framed thereunder confer any power on the Tribunal to set aside *ex parte* award.

37. The Apex Court, after noticing the above contentions, observed in paras-5 and 6 as under:-

> "In dealing with these contentions, it must be borne in mind that the Industrial Disputes Act, 1947 is a piece of legislation calculated to ensure social justice to both employers and the employees and advance progress of industry by bringing harmony and cordial relations between the parties. In other words, the purpose of the Act is to settle disputes

between workmen and employers which if not settled, would result in strikes or lock-outs and entail dislocation of work, essential to the life of the community. The scheme of the Act shows that it aims at settlement of all industrial disputes arising between the capital and labour by peaceful methods and through the machinery of conciliation, arbitration and if necessary, by approaching the Tribunals constituted under the Act. It, therefore, endeavours to resolve the competing claims of employers and employees by finding a solution which is just and fair to both the parties.

We are of the opinion that the Tribunal had the power to pass the impugned order if it thought it fit in the interest of justice. It is true that there is no express provision in the Act or rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statue to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

38. The Supreme Court laid down that even in absence of a specific provision in the Act or Rule the Tribunal was empowered to pass appropriate order in the interest of justice. It further held that, even in the absence of express provisions in the Act or the Rule giving the Tribunal jurisdiction to entertain an application for setting aside the *ex parte* Award; in a case of

that nature, the Tribunal should be considered as invested with such incidental or ancillary powers because there was no statutory prohibition.

39. As regards the provisions of Section 17A of the Act, the Supreme Court observed as under:

> "The contention that the Tribunal had become *functus officio* and, therefore, had no jurisdiction to set aside the award and that the Central Government alone could set it aside, does not commend to us. Sub-section (3) of S.20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under S. 17A. Under S. 17A of the Act, an award becomes enforceable on the expiry of 30 days from the date of its publication under S. 17. The proceedings with regard to a reference under S. 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the dispute referred to it for adjudication and upto that date it has the power to entertain an application in connection with such dispute. That stage is not reached till the award becomes enforceable under S. 17A. In the instant case, the Tribunal made the *ex parte* award on December 9, 1976. That award was published by the Central Government in the Gazette of India dated December 25, 1976. The application for setting aside the *ex parte* award was filed by respondent No.3, acting on behalf of respondents Nos. 5 to 17 on January 19, 1977, i.e., before the expiry of 30 days of its publication and was, therefore, rightly entertained by the Tribunal. It had jurisdiction to entertain it and decide it on merits. It was, however, urged that on April 12, 1977 the date on which the impugned order was passed, the Tribunal had in any event become *functus officio* we cannot accede to this argument. The jurisdiction of the Tribunal had to be

> seen on the date of the application made to it and not the date on which it passed the impugned order. There is no finality attached to an ex-parte award because it is always subject to its being set aside on sufficient cause being shown. The Tribunal had the power to deal with an application property made before it for setting aside the ex-parte award and pass suitable orders.
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> (emphasis supplied)

40. As regards the time in which an application for setting aside *ex parte* award could be preferred in case of a party governed by the Central Rule, the Supreme Court, based on provision of section 17A, laid down that the same should be within a period of 30 days from the date of publication of the award. However, one more fact needs to be noticed here is that the Central Rule does not have a provision similar to Section 31A of the Bombay Rules. The Apex Court in the above decision ruled that no finality is attached to an *ex parte* award and it can be set aside if sufficient cause is shown as to what prevented the party from appearing before the Tribunal. The Supreme Court has also held that the Tribunal was empowered to pass appropriate order in the interest of justice.

41. In the case of **Anil Sood** (supra), the Apex Court was concerned with the case where the

Tribunal as well as the High Court had refused to grant application for setting aside an *ex parte* Award. The argument on behalf of the respondents, in that case, was that the appellant was served with the notice and did not appear and, hence, did not have any case for setting aside the Award. The Apex Court rejected the said contention and observed as under:

> "5. This Court in *Grindlays Bank Ltd.'s* case (supra) examined the scheme of the provisions under the Industrial Disputes Act and enunciated that Section 11 of the Industrial Disputes Act conferred ample powers upon the Tribunal to devise its own procedure in the interest of justice which includes powers which bring out the adjudication of an existing industrial dispute. Sub-sections (1) and (3) of Section 11 of the Act thereby indicate the difference between procedure and powers of the Tribunal under the Act while the procedure is left to be devised by the Tribunal to suit carrying out its adjudication.
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> 6. If this be the position in law both the High Court and the Tribunal fell into error in stating that the Labour Court had become *fuctus officio* after making the Award though *ex parte*. We set aside the order made and the Award passed by the Labour Court and affirmed by the High Court in this regard, in view of the fact that the learned Counsel for the respondent conceded that application filed by the appellant be allowed, set aside the *ex parte* Award and restore the reference. To decide the matter afresh, the parties shall appear before the Labour Court on 11.12.2000 to take further directions as regards the proceedings. As the matter is very old, it would be appropriate for the Labour Court to dispose of this reference as expeditiously as possible but not later than six months from today."

42. In the case of **South Seas Distilleries and Breweries Pvt. Ltd.** (supra), the learned Single Judge has laid down a law as under:

> " ..... A conjoint reading of Rule 26 and 31A would, therefore, show that the time to set aside the award unlike the Central rules is within 30 days of the receipt of a copy of the award by the party. Though the award becomes final on publication and expiry of thirty days, the right to apply for setting aside the award may be in excess of 30 days if the rule as it exists is construed. Rule 26(2) as it stands requires the making of an application within thirty days of the receipt of the copy of the award. There is nothing like waiting for publication of the award. The Central Rules as interpreted in Grindlays Bank (1981 Lab. ICC 155) (supra), a view has been taken that an application can be made any time before the expiry of thirty days from publication of the award. There is no specific rule in the Central Rules unlike the Bombay Rules, which provide the period during which the application is to be made....."
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> "..... A duty is cast on the State Government to send a copy of the award for publication to the Labour Court or Tribunal and at the same time to the parties. The application by the party must, therefore, be within thirty days of receipt of the award. The subsequent communication by the Labour Court or the Tribunal is only a communication that the award has been published. The second notice does not extend the period of limitation prescribed under Rule 26(2). The period of 30 days therefore expires on the expiry of thirty days from the receipt of the copy of the award."
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> ....
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> "12. The following conclusions, therefore, emerge:
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> (i) Under the Bombay Industrial Dispute Rules, the time for setting aside the award is 30 days from the date of

receipt of the copy of the Award. As the Rule reads, even on the award becoming final on expiry of 30 days from the publication of award under Section 17A the Court of Tribunal does not become functus officio considering the Bombay Rules. The time for setting aside the Award stands extended even after the expiry of 30 days from the date of publication.

(ii) If the Tribunal does not become functus officio even after expiry of 30 days from publication, considering Rule 26, the issue whether there can be an application for condonation of delay is not decided and is left open as it is not required to be decided on the facts of the case.

(iii) On facts no case is made out to either interfere with the order rejecting the application for setting aside the exparte award on the ex-parte award itself."

43. As against above, in the case of **Mhatre Pen and Plastics Pvt. Ltd.** (supra) there was no occasion for the Court to consider the provisions of section 26(2) and 31A of the Bombay Rules, since none of these provisions was attracted on the facts of that case.

Consideration :
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44. Having heard rival parties, in the light of factual matrix, on the backdrop of the law laid down by the Apex Court as well as this Court, no fault can be found with the view taken by the learned Judge of the Second Labour Court in the impugned order.

45. The order of the Labour Court is well reasoned order and based on correct appreciation of law as laid down by this Court as well as by the Apex Court.

46. In the case at hand, there is no dispute that respondent No.1 was served with the Award by the office of the Commissioner of Labour on 27th January, 1999. The respondent No.1 for the first time came to know of the award on 27th January, 1999. He filed an application to set aside *ex parte* award on 29th January, 1999. The application, thus, was made within the time prescribed under Rule 26(2) of the Bombay Rules. The provision of Rule 26(2) entitles the party to make an application for setting aside the ex-parte award/ order or judgment within a period of 30 days from the date of receipt of copy of the award.

47. In the above circumstances, if rules 26(2) and 31A(2) are read together, it will be clear that the publication of the intimation by the petitioner in respect of factum of passing an Award in the news paper was not a mode of intimation prescribed or recognised by the Rules. The Apex Court in the case of **State of Uttar Pradesh v. Singhara Singh**, AIR 1964 SC 358, laid

down a principle that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Thus, the news paper publication was not in consonance with the Rules framed under the Act.

48. Rule 31A requires the State Government to forward a copy of the Award to the parties to the dispute and is required to intimate or inform the parties concerned the date of publication of the Award in the Official Gazette or on notice board of the Board, Court or Tribunal as the case may be. The State Government claims to have informed the parties by its letter dated 7th August, 1998 informed the parties about publication of the award on 5th August, 1998. However, this intimation letter was not received by respondent No.1 since it was sent to the address of the Factory which was closed and there was nobody to receive it. The Labour Court in the impugned order, in para-11 thereof, has given a factual finding that the respondent No.1, in fact, had closed the business of the partnership firm on 20th March, 1995. The Labour Court has also recorded the finding of the fact that the notices issued by Government Labour Officer or the Conciliation Officer were not served as the establishment was closed. Even the communication

sent by R.P.A.D. was returned back with the postal endorsement "Closed". The Labour Court has also recorded a finding of fact that the petitioner was in know of the changed address of respondent No.1. The Labour Court, thus, rightly concluded that intimation of publication was not served upon the respondent. Hence, the respondent No.1 was not aware about the Award and/or its publication till 27th January, 1999.

49. In the above view of the matter, the view taken in the impugned order is a reasonable and possible view. Even otherwise, in exercise of writ jurisdiction under Article 227, it is not possible for this Court to take contrary view to dislodge the well considered judgment of the Court below based on findings of fact. The impugned order, in effect, provides opportunity of hearing to the affected party keeping in view the principles of natural justice. Let there be an award on merits with full contest rather than by way of default. The petition is, thus, liable to be dismissed.

50. In the result, petition is dismissed.

Rule stands discharged with no order as to costs.

(V.C.DAGA, J.)